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# RLI 285: Research Library Issues: A Report from ARL, CNI, and SPARC 2015 -- Special Issue on Copyright

Prudence Adler

*Association of Research Libraries*

Brandon Butler

*American University*

Jonathan Band

*policybandwidth*

Krista Cox

*Association of Research Libraries*

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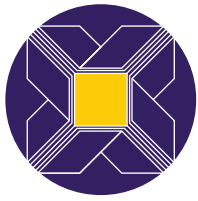
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### Special Issue on Copyright

**Prudence S. Adler, Associate Executive Director, Federal Relations and Information Policy, ARL**

**T**here has been a significant amount of activity on copyright issues over the past year and a half—in US courts, in the US Congress, and at the international level. Many of these activities have major implications for the work of research libraries and higher education, especially in regard to the ability of these institutions to fulfill their missions.

In “Fair Use Rising: Full-Text Access and Repurposing in Recent Case Law,” Brandon Butler, practitioner-in-residence at the American University Washington College of Law, reviews six recent fair use decisions that cut across many socially important and beneficial purposes. He highlights the trend of courts finding in favor of allowing “the broad redistribution of unaltered, full-text documents for new purposes.” Butler explains how this trend presents new opportunities for research libraries to use and re-purpose the full text of copyrighted works in their collections.

Exploring the implications of one critically important case for research libraries, Jonathan Band, legal counsel to the Library Copyright Alliance (LCA), reviews key aspects of the decision in *Authors Guild v. HathiTrust*. Band notes, “The decision has implications for libraries that go far beyond the specific facts of the case. This paper offers some preliminary thoughts on what these implications may be.” Band reviews several issues including mass digitization and storage, access to works, suggestions concerning other forms of access, and associational standing. With the recent settlement of the *HathiTrust* case and the rulings by the district and appeals courts, libraries may now, with strong confidence, engage in mass digitization, provide access to digitized texts for the print-disabled, and more.

Finally, Krista Cox, director of public policy initiatives for ARL, reviews a range of international activity relating to copyright and what all of these activities mean for research libraries in “International Copyright Developments.” These developments range from work at the World Intellectual Property Organization (WIPO) on the Marrakesh Treaty for the Blind, Visually Impaired, or Print Disabled, to WIPO discussions of exceptions and limitations for libraries and education, as well as international trade agreement negotiations that have been underway for quite some time. All of these international activities have long-term implications for how research libraries and higher education may engage in research, teaching, and learning.

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## Fair Use Rising: Full-Text Access and Repurposing in Recent Case Law

**Brandon Butler**, Practitioner-in-Residence, American University Washington College of Law

It has been a very good year and a half for fair use. In case after case, from earnings calls about watches to appropriation art about Rastafarians, courts drew a clear line allowing broad and free re-use of copyrighted works for a variety of socially beneficial purposes. Indeed, one trend across all but one of these cases is the broad redistribution of unaltered, full-text documents for new purposes. When a user has a new and socially beneficial purpose that is different from the author's original purpose in creating and publishing the work, courts call such uses "transformative," and give them broad leeway under the fair use doctrine. For obvious reasons, research libraries may be better positioned than almost any other institutions to take advantage of this salutary embrace of re-purposing full-text works. This article describes six fair use decisions handed down in the last 18 months with powerful implications for research libraries' fair use rights.<sup>1</sup>

The Second Circuit's decision in *Cariou v. Prince*<sup>2</sup> provides an example of fair use that is transformative without being critical. The case involved appropriation artist Richard Prince and his use of photographs of Rastafarians taken by Patrick Cariou. In his own work, Prince altered Cariou's work in a variety of ways, including dramatically enlarging the images, cutting and pasting pieces of the photos into collages, and painting over the images. Prince gave coy, ambivalent descriptions of his purposes in re-using Cariou's work, including expressly disclaiming any intention of commenting on or criticizing Cariou or his work.<sup>3</sup> The district court ruled for Cariou, saying Prince's use was not fair because he had no intent to criticize Cariou. The appeals court disagreed, saying the key question was whether Prince's appropriations served new aesthetic purposes and would be received differently by their intended audience. Because Prince's paintings created a radically different impression on the viewer than Cariou's original photos,<sup>4</sup> and served different audiences,<sup>5</sup> the appeals court ruled that Prince's uses were fair.

In *Swatch v. Bloomberg LP*,<sup>6</sup> the Second Circuit court of appeals held that it was fair use for news organization Bloomberg to post the entirety of a recorded Swatch earnings call online as part of its news coverage of the company. Remarkably, the court's initial opinion found that the use was fair use **despite** being "non-transformative and commercial,"<sup>7</sup> but it issued an amended opinion months later removing that description and adding a new section arguing instead that the use was "arguably transformative" because of its novel purposes.<sup>8</sup> Specifically, the court argued that Bloomberg had published the call to a different audience (its subscribers, as distinct from Swatch shareholders) and for a different purpose (to portray objectively the content of the call, rather than to persuade or justify the company's actions). These new purposes, together with the strong public interest in public availability of financial information, led the court to find Bloomberg's use fair.

Novel purposes also led to a finding of fair use in *White v. West Publishing Corp.*, where a commercial database service copied and made available the full text of legal briefs to facilitate research.<sup>9</sup> White, an attorney, sued West and Lexis, alleging that their practice of ingesting appellate briefs into their legal

research databases and making the briefs available to database subscribers violated the copyrights of the briefs' authors, including White. The court disagreed, citing the value added by Lexis and West as well as the publishers' novel purposes relative to the briefs' authors. The court's finding regarding the fair use import of adding value to digital documents may be the most interesting one for libraries considering digitizing and indexing collections materials: "West and Lexis's processes of reviewing, selecting, converting, coding, linking, and identifying the documents 'add[ ] something new, with a further purpose or different character' than the original briefs."<sup>10</sup> The internal quotation is from *Campbell v. Acuff-Rose*, the most recent Supreme Court opinion on the scope of fair use.

A pair of additional cases involving lawyers, this time as the defendants, provides another example of novel purposes and favored public policy playing a decisive role in fair use decision-making.<sup>11</sup> Both cases involve law firms copying the full text of scientific articles in the process of researching, filing, and prosecuting patent applications. The government requires that patent applicants include such articles, known as non-patent literature (NPL), as evidence regarding the originality and novelty of their inventions. Patent law firms file copies of NPL with the US Patent and Trademark Office and retain copies for their clients' files. Citing an earlier case finding Texaco scientists infringed copyright by copying journal articles for their research,<sup>12</sup> scientific publishers demanded that the law firms pay a license to copy NPL. The courts disagreed, finding that using the articles as evidence in a patent proceeding is a transformative use different from the articles' intended use of providing scientists in the field with the latest developments. The *Texaco* case has been widely cited for the proposition that where there is a ready licensing market (in that case, a market operated by the Copyright Clearance Center), all users must pay a license to photocopy. These two recent cases show that a sufficiently novel purpose will trump the presence of such a market.

Last, but certainly not least, the Second Circuit's opinion in the *Authors Guild v. HathiTrust*<sup>13</sup> case sheds more light on when full-text copying and distribution will be considered fair. In *HathiTrust*, the court found that a group of universities were protected by fair use when they digitized millions of in-copyright books in order to create a digital search tool that would help scholars locate books and conduct new modes of text-mining research across the corpus. The court also found that it was fair use to provide robust digital versions of books (including both text and images) to print-disabled library users, citing the strong public policy favoring equal access as well as the near-total failure of the market to serve print-disabled readers. Finally, although the court did not render an opinion regarding use of the database to provide replacement copies as a preservation measure, it seemed to endorse the practice of retaining digitized copies in redundant databases to ensure the works' continued availability long after the expiration of their copyright term.

Here are some key takeaways for research libraries from these six cases:

1. **Making entire, unaltered works available for reading may be found fair where the user's purpose differs sufficiently from the original purpose of the work, and the amount taken is justified by that novel purpose.** In all but one case (*Cariou*) an original, unaltered work was published to a particular

audience to serve a defined purpose, and fair use permitted copying and distribution where the purpose and/or the audience was distinct from the original purpose or audience for the work.

2. **Copying and distribution that is conducted systematically and at a large scale can be found fair where the use is for a new, favored purpose.** Lexis and West ingested millions of legal briefs from appellate courts around the country. HathiTrust contains millions of digitized books, made available to thousands of print-disabled users. Patent attorneys file applications with hundreds of journal articles as a routine part of their practice. This provides further evidence that the 1976 *Classroom Guidelines*, which include requirements that uses be spontaneous, isolated, and never of complete works, have now been completely eclipsed by the case law, and have become obsolete as fair use guidance documents.
3. **A new use need not criticize or comment on an existing work in order to be fair, if its purpose is sufficiently novel.** Because the Supreme Court's most recent fair use decision involved a parody, some have said that all fair uses must be critical of the works they reuse. The most recent cases show that this simply is not true. Each of the uses above involves re-use that is neither criticism nor commentary, and yet the courts still found them to be transformative due to their novel purposes.
4. **Processing activities that are common in libraries—"reviewing, selecting, converting, coding, linking, and identifying...documents"—can be part of a compelling case for fair use.** Libraries invest substantial time, money, and expertise adding value to their collections in these ways, and a court has now recognized that such activities constitute the kinds of value-adding activities that fair use favors.
5. **Even non-transformative use of entire works can be fair where the purposes are sufficiently favored and the markets have failed.** While these cases show, yet again, the courts' strong preference for "transformative use," that is, uses for new purposes, in new contexts, with value added, and so forth, the *HathiTrust* case also shows the continuing relevance of market failure. Where there is strong evidence of a public policy favoring access from the courts, from legislative history, and from other laws favoring the activity, **and** where the market has apparently failed completely to serve a given community, courts can invoke fair use to protect an institution that provides access to otherwise inaccessible works. This should give libraries comfort as they work to meet their mission (and their legal responsibility) to provide equitable access to all users.

## Endnotes

- 1 Another very important fair use decision, the 11th Circuit's opinion in *Cambridge University Press et al. v. Becker*, also known as the Georgia State University (GSU) e-reserves case, was issued in late 2014. Although the case also has important implications for research libraries and their users, it does not involve full-text repurposing, so it is outside the scope of this article. Unlike the uses described in this article, the court found Georgia State's uses to be non-transformative, so the amount of the original work that could be reused was substantially limited compared to uses described below.



- 2 714 F.3d 694 (2nd Cir. 2013).
- 3 *Id.* at 707 (“The district court based its conclusion that Prince’s work is not transformative in large part on Prince’s deposition testimony that he ‘do[es]n’t really have a message,’ that he was not ‘trying to create anything with a new meaning or a new message,’ and that he ‘do[es]n’t have any... interest in [Cariou’s] original intent.’”).
- 4 *Id.* at 706. “Where Cariou’s serene and deliberately composed portraits and land-scape photographs depict the natural beauty of Rastafarians and their surrounding environs, Prince’s crude and jarring works, on the other hand, are hectic and provocative.”
- 5 *Id.* at 709. The opinion contrasts the low sales figures and moderate price of Cariou’s photo book with the celebrity buyers and higher prices of Prince’s works to show that Prince’s work “appeals to an entirely different sort of collector than Cariou’s.”
- 6 2014 WL 2219162 (2014).
- 7 742 F.3d 17, 27 (2014) *amended by* Swatch Management Group v. Bloomberg LP, 2014 WL 2219162 (2014).
- 8 2014 WL 2219162 at \*9.
- 9 White v. West Pub. Corp., 2014 WL 3057885 12-civ-1340-JSR (S.D.N.Y. 2014).
- 10 *Id.* at \*2.
- 11 Am. Inst. of Physics v. Winstead PC, 3:12-CV-1230-M, 2013 WL 6242843 (N.D. Tex. Dec. 3, 2013) (journal article used in patent process “is transformed from an item of expressive content to evidence of the facts within it”); Am. Inst. of Physics v. Schwegman, Lundberg & Woessner, P.A., CIV. 12-528 RHK/JJK, 2013 WL 4666330 (D. Minn. Aug. 30, 2013), appeal dismissed (Feb. 19, 2014) (finding “there is no reasonable dispute that Schwegman did not use the Articles ‘for the same intrinsic purpose as [the Publishers.]’”).
- 12 American Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1994).
- 13 Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2014).

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## What Does the *HathiTrust* Decision Mean for Libraries?

**Jonathan Band**, [policybandwidth](http://policybandwidth.com)

**T**he library community welcomed the decision of the US Court of Appeals for the Second Circuit in *Authors Guild v. HathiTrust*, 755 F. 3d 87 (2d Cir. 2014). The decision has implications for libraries that go far beyond the specific facts of the case. This paper offers some preliminary thoughts on what these implications may be.

The broadest implication of the decision arises out of a footnote. Ever since the adoption of the library exceptions in 17 U.S.C. § 108, rights holders have argued that section 108 limits the availability of fair use to libraries, notwithstanding the savings clause in section 108(f)(4) that states explicitly that “nothing in this section in any way affects the right of fair use as provided by section 107.” In this litigation, the Authors Guild repeatedly argued that section 108 restricted fair use. Judge Baer rejected this argument in the district court, and the Second Circuit rejected it again in footnote 4. Citing the savings clause, the Second Circuit stated that “we do not construe § 108 as foreclosing our analysis of the Libraries’ activities under fair use....”<sup>1</sup> Thus, the decision holds unambiguously that libraries may take full advantage of the fair use right.

The *HathiTrust* decision also demonstrates how the fair use right applies in the context of a specific library activity: mass digitization. The decision clearly indicates that the acts of a library digitizing the works in its collection, and the library’s storage of the resulting digital files, are fair uses under section 107 of the Copyright Act. The decision, however, provides less certainty concerning the permissible access to those digital files. The only form of full-text access the decision addresses directly is access by the disabled. To be sure, this is an incredibly important result for these individuals. But the court provides little specific guidance concerning the permissibility of other forms of access. Nonetheless, the court’s more general pronouncements concerning fair use should be helpful to libraries trying to determine the range of permitted access to their mass-digitization projects.

### 1. Mass Digitization and Storage

The *HathiTrust* decision provides libraries with a clear roadmap for the digitization of the analog works in their collections. The court considered whether two uses of the digital copies deposited in the HathiTrust Digital Library (HDL) were fair use: full-text search and access for the print-disabled. The court found that “it was reasonably necessary for the HDL to make use of the entirety of the works in order to enable the full-text search function.”<sup>2</sup> The court further found that HDL’s creating and maintaining four text-only copies of its entire database (one on the primary server at the University of Michigan, another at the mirror server at the University of Indiana, and two encrypted backup tapes at two secure locations on the University of Michigan campus) was justified for the purpose of balancing the load of user web traffic and as back-up in the case of a disaster.



Moreover, the court found that HDL demonstrated its need to retain image files in the four locations in addition to the text files. While the text files are required for text search and the creation of text-to-speech capabilities for the print-disabled, image files “provide an additional and often more useful method by which many disabled patrons...can obtain access to these works.”<sup>3</sup>

What is the practical effect of these holdings? Because providing full-text search capability justifies the creation and maintenance of a database of text files, a library could create and maintain a database of text files if the library provided full-text search capability of those text files. Likewise, because providing access for the print-disabled justifies the creation and maintenance of a database of image files, a library could create and maintain a database of image files if the library provided the print-disabled with access to those image files. Additionally, the library could create appropriate backup copies of these databases.<sup>4</sup>

As discussed below, the claims relating to “preservation” that were remanded to the district court actually concern the making of replacement copies “to be read and consumed by patrons.”<sup>5</sup> The court distinguished the creation of replacement copies for patron consumption from the broader preservation function: “By storing digital copies of the books, the HDL preserves them for generations to come, and ensures that they will exist when the copyright terms lapse.”<sup>6</sup> While the Second Circuit vacated the judgment concerning the “additional use” of making replacement copies, it left undisturbed the broader preservation function, thereby reinforcing the argument concerning the permissibility of mass digitization and storage.

In short, the *HathiTrust* decision indicates that a library could make digital copies of all the analog works in its collection, and store those copies as text and image files, if the library provided full-text-search capability and full-text access for the disabled.

## 2. Access to Works

While the court provided broad permission for libraries to digitize their collections, it addressed full-text access to the text and image files outside the library premises only in the context of the disabled. The court did not define the universe of the disabled entitled to full-text access, but the discussion of image files indicates that it goes well beyond the blind. The court stated that “[m]any legally blind patrons are capable of viewing these images if they are sufficiently magnified or if the color contrasts are increased.”<sup>7</sup> The court then added that “other disabled patrons, whose physical impairments prevent them from turning pages or holding books, may also be able to use assistive devices to view all of the content contained in the image files for a book.”<sup>8</sup>

But the court provides little direct guidance with respect to access for readers **without** disabilities. Significantly, a search on HDL does not result in a display of snippets, in contrast to Google Book Search (GBS). Indeed, the court stressed that HDL “does not allow users to view any portion of the books they are searching.”<sup>9</sup> Instead, HDL simply informs users which books contain the search term, and on what pages in those books the term appears. This three-judge panel of the Second Circuit evidently did not want to preclude the panel considering the pending appeal in the Google Books case from distinguishing the

*HathiTrust* decision on this basis. At the same time, this panel did not suggest that snippet display renders GBS unfair. This panel simply left the question open for the GBS panel. Accordingly, we will have to wait until the decision in the GBS case to know whether Judge Chin's holding permitting snippet display stands.

The court also did not resolve the issue of HDL's creation of a replacement copy "to be read and consumed by patrons" in the event a library's original copy is lost or destroyed. The court labeled this as a preservation use, and found that the plaintiffs may not have had standing to bring a claim related to this specific use. On this basis, the Second Circuit vacated the district court's judgment related to this use, and remanded the claim to the district court to determine whether any of the plaintiffs in fact had standing. On December 23, 2014, the parties signed a stipulation under which the plaintiffs dismissed this claim based on the defendant libraries' representation that they only made replacement copies from HDL where (i) the original copy that was being replaced was damaged, deteriorating, lost, or stolen; and (ii) it was determined, after reasonable effort, that an unused replacement could not be obtained at a fair price.

### 3. Suggestions Concerning Other Forms of Access

The *HathiTrust* decision could be read as suggesting that the display of thumbnails of digitized images (e.g., digitized archives of photographs) would be permissible. In support of the position that full-text search is a transformative use, the court cited two Ninth Circuit decisions that held that "the use of copyrighted thumbnail images in internet search results was transformative because thumbnail copies served a different function from the original copyrighted images."<sup>10</sup>

The court's more general fair use pronouncements could also assist libraries in determining what access to allow to their digitized copies. As the fair use jurisprudence has placed greater emphasis on whether a use is "transformative," rights holders have argued that the work itself had to be transformed in some manner for the use to be transformative. They pointed to parody as the quintessential transformative use.<sup>11</sup> In contrast, defendants have asserted that a use could be transformative if the use served a different purpose or function from the original, even if the work itself was not transformed. The copying of student papers for use by plagiarism-detection software is an example of this sort of use.<sup>12</sup>

In this case, the Authors Guild argued that the other circuits that had adopted this "functional transformation" approach had erred, that the Second Circuit itself had not adopted this approach,<sup>13</sup> and that the Second Circuit should not follow the other circuits. Fortunately, the Second Circuit rejected the Authors Guild's assertion, finding that "a transformative work is one that serves a new and different function from the original work and is not a substitute for it."<sup>14</sup> The court elaborated that "a use is transformative if it does something more than repackage or republish the original work."<sup>15</sup> Because authors do not write with the purpose of enabling text searches of their books, the full-text search function does not "supersede the objectives or purposes of the original creation."<sup>16</sup> The court added that "by enabling full-text search, the HDL adds to the original something new with a different purpose and a different character."<sup>17</sup>

In addition to clearly accepting the functional transformation approach, the court explained the impact of a finding of transformativeness on the fourth fair use factor, the effect of the use on the potential market: “under Factor Four, any economic ‘harm’ caused by transformative uses does not count because such uses, by definition, do not serve as substitutes for the original work.”<sup>18</sup> The court later underscored this point: “The only market harms that count are the ones that are caused because the secondary use serves as a substitute for the original, not when the secondary use is transformative...”<sup>19</sup> And again: “Lost licensing revenue counts under Factor Four only when the use serves as a substitute for the original and the full-text-search use does not.”<sup>20</sup>

With respect to the third fair use factor, the amount and substantiality of the portion used, the court stressed that the extent of permissible copying varies with the purpose and character of the use. “For some purposes, it may be necessary to copy the entire copyrighted work, in which case Factor Three does not weigh against a finding of fair use.”<sup>21</sup>

In sum, the court found that a use is transformative if it has a different purpose or function from that of the original work. If the use is transformative, any economic harm such as lost licensing revenue is irrelevant for purposes of the fair use analysis. Further, the user may copy as much of the work as necessary to achieve his or her transformative purpose.

The court’s unambiguous endorsement of the functional transformation approach, combined with its discounting of lost revenue from such transformative uses, provides libraries with a solid basis for providing full-text access to its digitized copies when the underlying purpose of providing the access is different from the author’s original purpose. Thus, a library could provide access to digitized archival material such as an organization’s records. The purpose of the access is to enable scholarly research of the organization’s history, while the records were created to facilitate the operation of the organization. Although this reasoning probably would apply to most archival material, care should be exercised with respect to archives of entertainment content such as films. It is possible that many of the potential viewers of more popular films desire access to the films for entertainment rather than research purposes.

With respect to databases of digitized books, such as HDL itself, similar caution should be exercised. The Second Circuit found that providing the print-disabled with full-text access was not a transformative use: “By making copyright works available in formats accessible to the disabled, the HDL enables a larger audience to read those works, but the underlying purpose of the HDL’s use is the same as the author’s underlying purpose.”<sup>22</sup> Even though the use was not transformative, the court nonetheless found that access was justified because of the special circumstances of the disabled. Because this rationale obviously would not apply if a library sought to provide full-text access for the non-disabled, the library typically would have to justify the access on functional transformation grounds. That is, the purpose of the use enabled by the access would have to be different from the author’s original purpose in writing the book.

For certain categories of books, identifying a different purpose should be straightforward. For example, books on the natural or physical sciences written before a certain date (say 1990) would be of interest to

readers for the purpose of researching the history of science, not for the purpose of advancing knowledge in that scientific field.

Librarians and scholars may be able to develop alternative approaches for identifying different purposes with respect to other categories of books. For example, under some circumstances consideration of library circulation statistics might be an appropriate basis for identifying a different purpose. If a novel circulated only five times in the 10 years prior to digitization, it could be safe to assume that anyone who sought access to the digitized copy of the novel did so for scholarly purposes such as studying the author or a literary movement. The circulation figures would act as a surrogate or proxy for the changing purpose of access to the work. The scholarly purpose could further be ensured if access were provided only to faculty and students, and not the general public.

Library circulation statistics could also provide a basis for determining whether to allow access to digitized books in certain situations the Second Circuit might consider non-transformative. (As noted above, the Second Circuit recognized that non-transformative uses could also be fair.) Many scholarly monographs on narrow topics might be borrowed a few times soon after publication, and then are hardly circulated at all. It is possible that a faculty member or graduate student who sought access to such a scholarly monograph after it was digitized would do so for the purpose intended by the author, i.e., to learn about the subject matter of the monograph. Nonetheless, because scholarship and research are among the legitimate purposes specifically enumerated in section 107, the first factor tilts in favor of the use, even though it is non-transformative. Moreover, the very low demand for the book, demonstrated by its infrequent circulation, suggests that there no longer is an actual or potential market for the book that could be harmed by providing digital access to the book. Accordingly, libraries perhaps should consider providing access to digitized books that have historically low circulation rates. If demand for a book (either digitally or in hard copy) increases after such access is provided, the library could decide whether it is appropriate to continue to allow full-text access to this re-discovered work.

## 4. Associational Standing

A final implication of the decision merits mention: the reduction of infringement actions by associations. The Second Circuit affirmed the district court's holding that associations such as the Authors Guild do not have standing to bring copyright infringement actions on behalf of their members. This holding will prevent US rights-holder associations from bringing broad, policy-driven copyright infringement actions. However, foreign associations that under foreign law have the right to bring enforcement actions on behalf of their foreign members would still have standing to bring copyright infringement actions in the United States on behalf of their members. Moreover, copyright class actions might still be permitted.

## Conclusion

The *HathiTrust* decision provides libraries with much greater certainty concerning their mass-digitization projects. The decision indicates that the act of digitization, and the storage of digital files, is a fair use

if the libraries provide full-text search functionality and full-text access for disabled individuals. With respect to full-text access for the non-disabled outside of the library premises, the court ruled that a use could be transformative if the function or purpose of the use is different from that of the original work. This holding could reasonably be interpreted as permitting full-text access to most digitized archival material (except some popular entertainment materials). Full-text access to certain categories of digitized books, e.g., older books in certain scientific fields or books that are infrequently circulated, may also be permitted. Further discussion between librarians and scholars may lead to other approaches that could provide a basis for allowing full-text access to additional books.

## Endnotes

- 1 775 F.3d at 94, n. 4.
- 2 *Id.* at 98.
- 3 *Id.* at 102–03.
- 4 The Second Circuit did not address the temporary copies made within the HathiTrust servers during the course of performing a search. Presumably the court considered these temporary copies to be so temporary as to not be copies within the meaning of the Copyright Act, see *Cartoon Network v. CSC Holdings*, 536 F.3d 121 (2nd Cir. 2008); or fair uses, see *Perfect 10 v. Amazon.com*, 508 F.3d 1146 (9th Cir. 2007). It is safe to assume that the court would also view any temporary copies made during the course of other “non-consumptive” uses of the database, such as text mining, as non-infringing.
- 5 *Id.* at 103.
- 6 *Id.*
- 7 *Id.*
- 8 *Id.*
- 9 *Id.* at 97.
- 10 *Id.* at 97.
- 11 See *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994).
- 12 See *A.V. ex rel. Vanderhye v. iParadigms*, 562 F.3d 630 (4<sup>th</sup> Cir. 2009).
- 13 The Second Circuit had, in fact, already recognized functional transformation in *Bill Graham Archives v. Dorling Kindersley*, 448 F.2d 605 (2d Cir. 2006).
- 14 *HathiTrust* at 96.
- 15 *Id.*
- 16 *Id.* at 97.

17 *Id.*

18 *Id.* at 99.

19 *Id.*

20 *Id.* at 100.

21 *Id.* at 98.

22 *Id.* at 101.

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## International Copyright Developments: From the Marrakesh Treaty to Trade Agreements

**Krista Cox**, Director of Public Policy Initiatives, ARL

**W**ith all of the recent domestic copyright activity relating to libraries—important fair use cases such as the Authors Guild’s litigation against HathiTrust and the review of copyright law by the US House of Representatives, the US Patent and Trademark Office, and the Copyright Office—it could be easy to overlook the important copyright policy developments occurring internationally. Many of these developments are taking place at the World Intellectual Property Organization (WIPO), including the Marrakesh Treaty for the Blind, Visually Impaired, or Otherwise Print Disabled and several ongoing discussions on the topics of libraries, education, and traditional knowledge and traditional cultural expressions. In addition to the discussions at WIPO, copyright policy is being shaped through ongoing negotiations of large regional trade agreements that contain, or are expected to contain, obligations regarding copyright. This article focuses on these recent international developments.

### World Intellectual Property Organization

WIPO’s Standing Committee on Copyright and Related Rights (SCCR) is a specialized committee set up in 1998 with the intention of examining substantive areas of copyright and related rights<sup>1</sup> and addressing harmonization of these rights. SCCR is expected to issue recommendations, developed on a consensus basis by all member states of WIPO, for consideration by the WIPO General Assembly. After the adoption in 2013 of the Marrakesh Treaty, which was led by SCCR, the committee has focused its attention on a broadcasting treaty and instruments related to limitations and exceptions for libraries and education.

### Marrakesh Treaty for the Blind, Visually Impaired, or Otherwise Print Disabled

Perhaps the most significant recent international copyright development occurred in June 2013 when WIPO adopted the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (“Marrakesh Treaty”). After several years of negotiations, WIPO member states called for a diplomatic conference in Marrakesh, Morocco, to create a treaty that would provide minimum standards for limitations and exceptions regarding the making and distribution of accessible-format works and allow for cross-border sharing of these formats.<sup>2</sup> Significantly, this treaty represents the first WIPO treaty directed at addressing the needs of the users rather than focusing on rights for rightsholders.

The successful outcome of the diplomatic conference demonstrates the strong international will to address the lack of accessible-format works for persons who are blind or print disabled, also known as a “book famine.” Estimates place the number of accessible-format works at approximately five percent of published works in developed countries, and significantly lower in developing countries. A 2006 WIPO study found that fewer than 60 countries—less than one-third of countries worldwide—had copyright

limitations and exceptions to benefit persons who are visually impaired (e.g., an exception that permitted the conversion of a work into an accessible format).

On June 28, 2013, at the Marrakesh Treaty signing and adoption ceremony, 51 countries signed the treaty, a record number of signatories for a WIPO-administered treaty. Today, 80 parties have signed the Marrakesh Treaty, though 20 ratifications are necessary before the treaty will enter into force. India became the first country to ratify the Marrakesh Treaty on June 24, 2014, representing another WIPO record—no other WIPO treaty received ratification within a year of its adoption. The large number of signatories and quick ratification by India highlight the importance of this issue in the international community. As of this writing, El Salvador, the United Arab Emirates, and the Eastern Republic of Uruguay, Mali, and Paraguay have also deposited their instruments of ratification or accession with WIPO and only 14 more ratifications are needed for the treaty to enter into force.

While the Marrakesh Treaty will greatly benefit those countries that do not have existing limitations and exceptions in their laws to address access by persons who are print disabled or do not have large numbers of accessible-format works, developed countries will also benefit from ratification and implementation. Broad implementation of the treaty will make it easier for entities working on behalf of the print-disabled in developed countries to import accessible-format works. The United States, for example, already has the Chafee Amendment (which permits the creation of accessible-format works), the fair use doctrine, and exceptions to the rules governing import and export.<sup>3</sup> However, if a print-disabled person in the United States seeks an accessible-format copy produced in another country, the copyright law in that country might prevent the export of the accessible copy to the United States. The Marrakesh Treaty would solve this problem by permitting authorized entities to import and export accessible format works for beneficiary persons, allowing entities to share resources. The United States could receive accessible formats from other English-speaking countries such as Canada, the United Kingdom, Ireland, Australia, and New Zealand.

In addition to allowing for the sharing of books between countries with a common language, the Marrakesh Treaty would benefit the print-disabled in the United States who speak other languages. In the US, approximately 13 percent of the population speaks Spanish. The United States also has a significant number of persons who speak Chinese, Tagalog, French, Vietnamese, German, Korean, Russian, Arabic, Italian, and Portuguese. Native speakers of these languages would benefit from the cross-border exchange provisions of the Marrakesh Treaty, as would English speakers learning a second language. The United States played a key role in the Marrakesh Treaty and, while the US signed the agreement in October 2013, it must still be ratified.

## **Negotiations for an Instrument on Libraries**

In 2008, WIPO released a study on copyright limitations and exceptions for libraries and archives, prepared by Kenneth Crews.<sup>4</sup> His study evaluated statutes from 149 countries and found that 128 had at least one statutory library exception, with the majority having more than one exception addressing library issues. This study revealed that the statutes differed greatly across countries, particularly with respect

to the reproduction right. Crews updated the study and presented it at WIPO in December 2014. The updated study evaluated 186 countries, finding that 153 had one or more “library exceptions.” Crews also identified some changes to national laws, including in the United Kingdom and Russia, both of which amended their copyright laws in 2014.

Following the 2008 study, a number of countries expressed interest in an international instrument to specifically address limitations and exceptions for libraries. Some developing countries, particularly the African Group, advocated for a single instrument for limitations and exceptions that would broadly address persons who are visually impaired, libraries, and education. In 2011, the African Group tabled a comprehensive proposal addressing these three topics. Ultimately, WIPO member states agreed to separate the issues and moved forward first with negotiations for persons who are visually impaired.

With the conclusion of the Marrakesh Treaty, attention at WIPO has turned to libraries. However, significant divergence exists among WIPO member states regarding not only the substantive provisions in the text, but also the nature of the instrument. While a number of countries, primarily developing countries, advocate for a binding treaty, other countries support a “soft” instrument instead, which could, for example, take the form of recommendations, principles, or a model law that would not be binding. There have been proposals reflecting the differences on the nature of an instrument. As noted above, prior to the success of the Marrakesh Treaty, the African Group proposed a comprehensive treaty on limitations and exceptions for the print-disabled, educational and research institutions, and libraries and archives. Brazil, Ecuador, and Uruguay tabled a proposal labeled by WIPO as “An Appropriate International Legal Instrument (in whatever form) on Exceptions and Limitations for Libraries and Archives,” thus avoiding any prejudgment on the nature of the instrument.<sup>5</sup> The US tabled a “soft law” document called “Objectives and Principles for Exceptions and Limitations for Libraries and Archives,” encouraging adoption of exceptions at the national level.

The topics under discussion for an instrument for libraries include: preservation of library and archival materials; the right of reproduction; distribution and safeguarding of copies; legal deposit systems; library lending; exhaustion of rights and parallel importation; cross-border sharing; orphan works; limitations on liability for libraries and archives; technological protection measures; relationship between limitations and exceptions of the instrument and contracts; and the right of translation.

The first two 2014 meetings of WIPO’s SCCR, which took place in May and July, were highly contentious, with the European Union (EU) refusing to agree to proceed with text-based work on limitations and exceptions for libraries, including a non-binding soft-law instrument.<sup>6</sup> The EU essentially blocked consensus at the first two meetings of 2014, resulting in the lack of conclusions to the meetings, a highly unusual development for SCCR.<sup>7</sup> While the most recent meeting of SCCR in December 2014 was reportedly more constructive and included sessions for Crews’s update on library limitations and exceptions,<sup>8</sup> the meeting ended only with a summary of the chairman’s conclusions. The previous practice of the SCCR to approve of the chairman’s conclusions has, apparently, not been reinstated after the May and July meetings ended so poorly. Some countries, including the US, have noted that the failure to advance conclusions from the meetings could call into question the usefulness of the committee.

## Negotiations for an Instrument on Education

The negotiations on an international instrument regarding limitations and exceptions for education are not as well advanced as for libraries. Few countries have made textual proposals and less time has been devoted to this topic. Additionally, similar to the negotiations for an instrument on libraries, there is substantial disagreement as to whether a binding treaty is necessary or whether a soft-law instrument should be pursued instead.

The topics for discussion regarding education include the scope of beneficiaries (uses by educational institutions or research organizations or other beneficiaries); exhaustion of rights and parallel importation; limitation on remedies; uses for in-classroom and out-of-classroom teaching; distance learning; uses for research; uses for persons with disabilities; orphan works; technological protection measures; ISP liability; and relationship with contracts.

As with the discussion on an instrument for libraries, the US tabled a document on “Objectives and Principles for Exceptions and Limitations for Educational, Teaching, and Research Institutions.” Like its document on libraries, the US encourages the adoption of national limitations and exceptions. The US also specifically supports limitations and exceptions for “technologically evolving learning environments.” In its objectives and principles for education, the US notes that, “An appropriate balance of rights and exceptions and limitations, consistent with international law, sustains the missions and activities of educational, teaching and research institutions.”

The recent blocking of consensus conclusions at SCCR, particularly the EU’s heavy resistance to working on the agenda for limitations and exceptions, raises questions as to when or whether this issue will advance at WIPO and what form any instrument might take.

## Negotiations for an Instrument on Traditional Knowledge, Traditional Cultural Expression, and Genetic Resources

WIPO’s Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (IGC) has been meeting three times each year with a directed objective of reaching an agreement on texts for a legal instrument to protect traditional knowledge, traditional cultural expressions, and genetic resources. Like the other topics under discussion at WIPO, there does not appear to be agreement as to the nature of the instrument, with developing countries calling for a binding treaty and developed countries remaining non-committal.

Traditional knowledge (TK) involves knowledge or practices passed between generations in a traditional context, such as the use of traditional medicines or knowledge about migration patterns. Traditional cultural expressions (TCEs) refer to expressions of folklore that form the identity or heritage of a community and are passed between generations, such as dances, songs, designs, or stories. Under standard intellectual property principles, TK and TCE are considered to exist in the public domain and are therefore free to use. However, indigenous peoples and local communities often argue that TK and TCE are subject to misappropriation or misuse, then later patented or copyrighted by a third party that

has appropriated or adapted the knowledge or work. Some WIPO member states argue that TK and TCE should be protected by the intellectual property system to prevent unauthorized use.

From the perspective of providing access to information, the draft texts on TK and TCE reveal a number of concerning provisions that could negatively affect the public domain. However, much of the language is bracketed, reflecting a lack of consensus among WIPO member states. Some of the concerns revolve around the following issues:

- **Subject matter of protection.** The draft text would apply to tangible as well as intangible forms of expression and includes protection for traditionally non-copyrightable expressions such as rituals, words, signs, names, symbols, games, and sports. Allowing for exclusive rights over these subject matters could seriously damage the public domain, removing existing materials from the public domain and allowing beneficiaries to hold exclusive rights over such expressions.
- **Definition of beneficiaries.** The text broadly provides that beneficiaries are indigenous peoples and local communities that create, express, maintain, use and/or develop TK and TCE, potentially subjecting huge numbers folktales that are currently in the public domain to protection.
- **Scope of protection.** Some formulations of the texts would allow beneficiaries to deny access to and use of the subject matter and prohibit modification that is deemed offensive or derogatory, essentially removing much subject matter from the public domain, preventing criticism or creation of many derivative works, and harming free speech. Additionally, unlike traditional copyright protection, some of the proposed text does not specify a period of time of protection; instead such protection may last as long as the subject matter continues to satisfy the criteria of eligibility, essentially making a time period of protection potentially unlimited. One option specifically provides that protection should “last indefinitely.”

The most recent IGC meeting took place July 7–9, 2014, and did not result in an agreement regarding whether to recommend that the General Assembly convene a diplomatic conference. A number of developing countries advocated for a 2015 conference. The US released a proposal suggesting that such a decision be delayed for the 2015 General Assembly, in which case a diplomatic conference would occur in 2016 at the earliest. The lack of consensus resulted in no official IGC recommendation. Instead, the chairman of IGC released a document with a proposed timeline, that included a suggestion that the WIPO General Assembly “take stock of and consider the text(s), progress made, and decide on convening a Diplomatic Conference.” Delegates at the WIPO General Assembly, which took place September 22–30, 2014, were unable to come to a decision point and the future of the IGC, which unlike the SCCR is not a permanent committee, is unclear. Because the General Assembly did not come to a decision on the work program for IGC, WIPO has not listed any IGC sessions on its 2015 calendar.

## Trade Agreements

In addition to the multilateral forum of WIPO, numerous trade agreements contain comprehensive chapters governing intellectual property rights. While trade agreements are often developed bilaterally



and some cover only select subjects related to trade, such as tariffs, others involve large regions with multiple trading partners and cover subject areas seemingly unrelated to trade. Two prominent regional trade agreements include the Trans-Pacific Partnership Agreement (TPP) and the Trans-Atlantic Trade and Investment Partnership (TTIP). Unfortunately, these trade agreements are negotiated behind closed doors and, unlike at WIPO, the negotiating texts are kept secret, making it difficult to comment on the proposed agreements. Only through leaks of the texts has the public been able to gain access to and understand the proposals.

Some members of the US Congress have criticized the secrecy of these trade agreement negotiations. For example, Senator Bernie Sanders (I-VT) wrote a letter to the US Trade Representative (USTR), the lead agency negotiating trade agreements, concluding, “the public has a right to monitor and express informed views on proposals of such magnitude as the TPP...Without access to the actual texts being discussed, in my view the effective input and informed participation of the public is severely curtailed.”<sup>9</sup> The lack of transparency has also been criticized by library organizations and civil society.

### **Trans-Pacific Partnership Agreement**

The Trans-Pacific Partnership Agreement (TPP) has been under negotiation since 2010. New negotiating parties have been added since the first round of negotiations and the agreement now has 12 negotiating parties. In addition to the US and Canada, the following countries are currently involved in the negotiations: Australia, Brunei, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam. This trading area comprises 40 percent of the world’s GDP and is intended to eventually cover the Asia Pacific Economic Cooperation (APEC) region.

Through several leaks of the negotiating text of the intellectual property chapter—one of the most controversial chapters of the agreement—the public is able to see what topics are being negotiated and which countries support or oppose particular proposals. The first leak of the comprehensive, consolidated intellectual property chapter, including country positions, occurred in November 2013, reflecting the state of negotiations as of August 2013. After this leak, US Representative Zoe Lofgren (D-CA) criticized the copyright provisions, noting in a press statement that the agreement “is something that is backdooring through a trade agreement, that which could not be obtained in Congress.”<sup>10</sup> The most recent leak occurred in October 2014 and reflected the state of negotiations as of May 2014.<sup>11</sup>

One of the most controversial issues regarding copyright in the TPP centers on copyright term. The United States proposed its current term of life of the author plus 70 years, or 95 years for published works for hire and 120 years for unpublished corporate works. The term of life plus 70 is supported by Australia, Chile, Peru, and Singapore, the four negotiating parties in the TPP that have already signed a bilateral free trade agreement with the US and previously agreed to this term. Mexico has proposed its domestic term of life plus 100 years. The remaining countries support the international standard of life of the author plus 50 years.

The danger of including the copyright term of life plus 70 in the TPP, aside from the harm that lengthy copyright terms have on the public domain and access to knowledge, is the difficulty in changing this



term in the future. Many in the US acknowledge that the present term is too long and Maria Pallante, Register of Copyrights, has suggested reintroduction of formalities for the last 20 years of copyright protection. However, changing the term of protection in US copyright law would violate the TPP if parties agree to a period of life plus 70 years in the final text. The US would also face difficulty in requiring formalities for the last 20 years of protection because the latest TPP leak shows a new provision that parties have agreed to prohibiting formalities.

Another controversial US proposal involved highly prescriptive provisions on technological protection measures (TPMs) that could prevent reform on this issue. The US proposal would have made the act of circumvention of a TPM an independent cause of action with no nexus to copyright infringement and used a narrow and closed set of limitations and exceptions to the circumvention prohibition. The US proposal also included a three-year rulemaking procedure for additional limitations and exceptions, modeled after Section 1201 of the Digital Millennium Copyright Act (DMCA). The new limitations and exceptions are valid only for a three-year period, then must be renewed. Under this formulation, permanent limitations and exceptions could not be added without violating the TPP or forcing renegotiation of these rules with all TPP parties. Thus, as with proposals or efforts to address the lengthy copyright terms in the US, Congress could not enact a permanent cell-phone unlocking exemption<sup>12</sup> or other permanent exceptions, such as to permit the visually impaired to overcome TPMs designed to limit access on e-readers, without disregarding its obligations to the other TPP parties.

However, in the most recent leak of draft TPP text, it appears that the US has dropped its proposed text on anti-circumvention measures and parties have agreed to language that does not require a three-year rulemaking process. The October 2014 leaked text would allow new permanent limitations and exceptions allowing for circumvention of TPMs, though it may still be difficult to create a general permanent exception allowing for circumvention of any non-infringing use due to language that seems to permit new limitations and exceptions only on a case-by-case basis.

While some of the proposals in the TPP could negatively affect the public domain and access to information, a significant and positive development occurred in July 2012 when the US introduced language on copyright limitations and exceptions. Prior free trade agreements generally included specific rights and protections for rightsholders, but failed to address limitations and exceptions. Based on the most recent leaked text, it appears that all TPP parties have agreed to language directing parties to “endeavor to achieve an appropriate balance” through limitations and exceptions, “including those for the digital environment, giving due consideration to legitimate purposes such as, but limited to, criticism, comment, news reporting, teaching, scholarship [or] research.” This language is derived from the US’s fair use statute. Additionally, the most recent leaked text reveals that parties have now agreed to language applying limitations and exceptions for persons who are blind, visually impaired, or otherwise print disabled and also contains a footnote referencing the Marrakesh Treaty. The language on limitations and exceptions is a welcome inclusion that ensures that the TPP will not undermine fair use, a critical “safety valve” in copyright law, and shows support for the Marrakesh Treaty.

## Trans-Atlantic Trade and Investment Partnership

The US has also started negotiating a trade agreement with the EU known as the Trans-Atlantic Trade and Investment Partnership (TTIP). Like the TPP, this agreement is expected to include a chapter on intellectual property. However, this chapter is not expected to be as comprehensive as its analog in the TPP and negotiators have stated that the TTIP will not create upwards harmonization of intellectual property rights. Both the US and the EU already have high levels of intellectual property protection and enforcement, though their systems differ in many respects.

Currently, neither party has put forward text on the intellectual property chapter but, instead, the negotiators have discussed principles, objectives, and a framework for the chapter. It is expected, however, that the agreement will include a list of treaties that both parties must ratify or accede to. Although the Marrakesh Treaty has not yet been ratified, both the US and the EU—along with seven individual member states of the EU—are signatories and the inclusion of a reference to the Marrakesh Treaty in TTIP remains a possibility. Hopefully, any specific obligations that are proposed with respect to copyright in the TTIP reflect a balance and include limitations and exceptions.

## Endnotes

- 1 In many non-US jurisdictions, the rights of performers are considered “related rights” rather than copyrights.
- 2 For a detailed explanation of the provisions of the Marrakesh Treaty, see Jonathan Band, “A User Guide to the Marrakesh Treaty,” Library Copyright Alliance, October 10, 2013, <http://www.librarycopyrightalliance.org/bm~doc/user-guide-marrakesh-treaty-1013final.pdf>.
- 3 In the United States, the current set of statutes permitting the creation and distribution of accessible-format works indicates that US copyright law is already in compliance with the Marrakesh Treaty and would not require any changes.
- 4 Kenneth Crews, *Study on Copyright Limitations and Exceptions for Libraries and Archives*, WIPO SCCR/17/2, August 26, 2008, [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_17/sccr\\_17\\_2.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_2.pdf).
- 5 Several proposals have been merged and at the most recent SCCR meeting the proposed text by the African Group, Brazil, Uruguay, and India was consolidated into one document.
- 6 Some speculate that the EU fears that discussion of a non-binding instrument would evolve into negotiations over a binding one.
- 7 See, for example, Catherine Saez, “Hopes Dampened for Copyright Exceptions For Libraries/Archives at WIPO,” *Intellectual Property Watch*, May 5, 2014, <http://www.ip-watch.org/2014/05/05/hopes-dampened-for-copyright-exceptions-for-librariesarchives-at-wipo/>; Catherine Saez, “WIPO Copyright Committee in Disarray Again; Development Dimension Questioned,” *Intellectual Property Watch*, July 7, 2014, <http://www.ip-watch.org/2014/07/07/>

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- 8 Catherine Saez, “WIPO Members Conclude Year Positively with Copyright Committee, Despite No Changes to Text,” *Intellectual Property Watch*, Dec. 14, 2014, <http://www.ip-watch.org/2014/12/14/wipo-members-conclude-year-positively-with-copyright-committee-despite-no-changes-to-text/>.
  - 9 Senator Bernard Sanders (I-VT) to Ambassador Ron Kirk, expressing concerns regarding the Trans-Pacific Partnership Agreement, Dec. 1, 2011, [http://keionline.org/sites/default/files/Sen\\_Sanders\\_letter\\_to\\_USTR\\_TPP\\_negotiations\\_12-1-2011.pdf](http://keionline.org/sites/default/files/Sen_Sanders_letter_to_USTR_TPP_negotiations_12-1-2011.pdf).
  - 10 Rep. Zoe Lofgren (D-CA), “Rep. Zoe Lofgren on Emerging & Controversial Trans Pacific Partnership (TPP) Trade Treaty,” press release, Dec. 5, 2013, <http://lofgren.house.gov/news/documentsingle.aspx?DocumentID=365675>.
  - 11 Krista Cox, “New WikiLeaks of the Trans-Pacific Partnership Agreement Intellectual Property Chapter—Analysis of Copyright Provisions,” *ARL Policy Notes* (blog), Oct. 16, 2014, <http://policynotes.arl.org/?p=15>.
  - 12 See Jonathan Band, “The End of the Cell Phone Unlocking Saga?,” *InfoJustice*, July 29, 2014, <http://infojustice.org/wp-content/uploads/2014/07/band-end-of-cell-phone-saga.pdf>.

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Association of Research Libraries  
21 Dupont Circle, NW, Suite 800  
Washington, DC 20036  
P: 202-296-2296  
F: 202-872-0884

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Assistant Editor: Kaylyn Groves

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